

NO. 05-18-00611-CV

IN THE COURT OF APPEALS FOR THE FILED IN
FIFTH DISTRICT OF TEXAS IN DALLAS 5th COURT OF APPEALS
DALLAS, TEXAS

08/15/2018 4:46:58 PM

PANDA POWER GENERATION INFRASTRUCTURE FUND, LLC, LISA MATZ
D/B/A PANDA POWER FUNDS, ET AL., Clerk

Appellants

V.

ELECTRIC RELIABILITY COUNCIL OF TEXAS, INC.,

Appellee

UNOPPOSED MOTION TO ABATE APPEAL OR, IN THE
ALTERNATIVE, FOR EXTENSION OF TIME

Appellants Panda Power Generation Infrastructure Fund, LLC d/b/a Panda Power Funds, et al. (collectively, “Panda”) file this unopposed motion to abate this appeal while the Texas Supreme Court reviews a mandamus opinion from this Court involving the same parties and raising the same issues. *Electric Reliability Council of Texas, Inc. v. Panda Power Generation Infrastructure Fund, LLC*, No. 05-17-00872-CV (Tex. App.—Dallas Apr. 16, 2018) (the “Mandamus Opinion”).

This case arises directly out of the Mandamus Opinion. There, this Court held that ERCOT is entitled to sovereign immunity and it directed the trial court to dismiss Panda’s suit on that basis. The trial court did just that, resulting in the final judgment at issue in this appeal (the “Dismissal Order”). Panda disagrees with that

order because it disagrees with the Mandamus Opinion that prompted it. Panda will soon file (no later than August 24, 2018) a petition for writ of mandamus in the Texas Supreme Court challenging the Mandamus Opinion. Given the overlap of parties and issues, the Supreme Court's resolution of that proceeding will drive the outcome of this appeal.

Thus, in the interest of judicial economy, Panda respectfully requests that the Court abate this follow-on appeal while the Supreme Court considers the sovereign immunity issues on which it turns. Strictly in the alternative, Panda requests a thirty-day extension of the deadline to file its Appellant's Brief, until September 23, 2018. ERCOT is not opposed to either form of relief.

BACKGROUND

1. In this case, Panda alleges that ERCOT committed fraud, negligent misrepresentations, and breaches of fiduciary duty in its private and public representations about the need for electric power in Texas.

2. ERCOT argued it was immune from suit. The trial court disagreed and denied ERCOT's plea to the jurisdiction. ERCOT challenged that order in this Court by filing a petition for writ of mandamus and interlocutory appeal, which were ultimately consolidated into a single proceeding, No. 05-17-00872-CV.

3. This Court issued its Mandamus Opinion in that proceeding on April 16, 2018, conditionally granting ERCOT's mandamus petition and holding that

ERCOT is entitled to sovereign immunity. In its order (the “Mandamus Order”), this Court directed the trial court to dismiss the underlying case for lack of jurisdiction and to “file with this Court, within thirty (30) days of the date of this order, a certified copy of his order issued in compliance with this order.”

4. On April 24, the trial court issued its Dismissal Order. The Dismissal Order “grants [ERCOT’s] plea to the jurisdiction based on sovereign immunity and dismisses [the trial court cause] for lack of jurisdiction.”

5. Panda immediately filed an emergency motion to stay the effect of the Mandamus Order and to set aside the Dismissal Order pending further appellate review. This Court denied that request on May 2, 2018, but nevertheless granted Panda an extension of time to file its motion for rehearing. Panda then filed a Motion for Reconsideration *En Banc*, which was denied on July 10, 2018.

6. Panda will seek further review of the Mandamus Opinion in the Texas Supreme Court. No later than August 24, 2018, Panda will file a petition for writ of mandamus in the Supreme Court to challenge this Court’s conclusion that ERCOT is entitled to sovereign immunity. ERCOT has also indicated that it may file a conditional cross-petition in the Supreme Court.

7. Panda timely filed this appeal of the Dismissal Order to preserve all possible appellate rights.

UNOPPOSED MOTION TO ABATE APPEAL

8. Abatement is appropriate because there is nothing to decide in this appeal, at least for now. This case is a procedural follow-on arising from the trial court's ministerial order dismissing Panda's lawsuit. In issuing that order, the trial court received no briefing or argument; it simply complied with the Mandamus Order by dismissing Panda's suit on the grounds of sovereign immunity.

9. ERCOT's entitlement to immunity will soon be considered by the Supreme Court. And the outcome of the current appeal will be guided by the Supreme Court's ruling. For example, if the Supreme Court concludes ERCOT does not have sovereign immunity and reverses the Mandamus Opinion, the Dismissal Order—which merely implemented the rulings in the Mandamus Opinion—must necessarily be reversed as well.

10. Thus, in the interest of judicial economy, the Court should abate this appeal pending the Supreme Court's review of the Mandamus Opinion. There is no reason for the Court to spend its time and resources on an appeal that may effectively be resolved in the Supreme Court. And it would be wasteful and inefficient to force the parties to litigate the same issues here, particularly since this Court has already issued its ruling (in the Mandamus Opinion) and has denied *en banc* reconsideration. Abatement of this appeal pending the Supreme Court's review of the Mandamus Opinion is appropriate.

11. If, however, this Court declines to abate the appeal, Panda respectfully requests a thirty-day extension of time—from August 22, 2018 to September 23, 2018—to file its Appellant’s Brief. This would be Panda’s first request for an extension of time to file its Appellant’s Brief.

12. ERCOT does not oppose the requested abatement or the alternative request for an extension of time, which are sought so that justice may be done in the disposition of this appeal and are not sought for purposes of delay.

CONCLUSION AND PRAYER

For these reasons, Panda respectfully requests that the Court grant this unopposed motion and abate this appeal pending the Supreme Court’s disposition of all proceedings seeking review of this Court’s April 16, 2018 opinion in Case No. 05-17-00872-CV. Alternatively, Panda requests that the Court grant its unopposed motion for extension of time and that the time for filing Panda’s Appellant’s Brief be extended until and through September 23, 2018. Panda further requests all such other relief to which it may be justly entitled.

Respectfully submitted,

/s/ Ben L. Mesches

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CERTIFICATE OF CONFERENCE

In accordance with Rule 10.1(a)(5) of the Texas Rules of Appellate Procedure, I certify that on August 13-15, 2018, I conferred with Rachel Ekery, counsel for ERCOT, regarding the relief requested above. Ms. Ekery stated that ERCOT does not oppose the relief requested in this motion.

/s/ *Ben L. Mesches*

Ben L. Mesches

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument was forwarded to all counsel of record by electronic filing in accordance with the Texas Rules of Appellate Procedure on the 15th day of August 2018.

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